No. 15296

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHFIELD OIL CORPORATION,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement as to Jurisdiction.

This is an appeal under Section 1291 of Title 28 of the United States Code (62 Stat. 929) from a decree [R. 55] sustaining respondent's exceptions [R. 27] to the amended libel [R. 3-26] and dismissing the amended libel in an action entitled "Richfield Oil Corporation, Libelant, vs. United States of America, Respondent," being in Admiralty No. 19103-BH in the District Court of the United States in and for the Southern District of California, Central Division, hereinafter referred to as "the case below."

This Court has jurisdiction under and pursuant to Section 1291 of Title 28 of the United States Code (62 Stat. 929).

As shown by the amended libel and pleaded therein [R. 4] the District had jurisdiction in the case below under and pursuant to Section 2 of the Act of March 9, 1920, commonly known as the Suits in Admiralty Act (41 Stat. 525; 46 U. S. C. A. 742).

Statement of the Case.

On August 26, 1955, appellant, libelant in the case below (hereinafter called libelant), paid $34,158.02 under protest to appellee, respondent in the case below (hereinafter called respondent) [R. 18-19], and on November 30, 1955, libelant brought suit against respondent under the Suits in Admiralty Act [R. 4] to recover said sum of money. Respondent filed exceptions to the libel urging dismissal on the ground that the allegations showed a voluntary payment and on the further ground that the two-year statute of limitations barred recovery. In May, 1956, the Court sustained the exceptions to the libel with leave to amend, thereby impliedly overruling respondent's contention that the two-year statute of limitations barred recovery.

The amended libel [R. 3-26] was filed on June 4, 1956, and expressly alleged facts showing that payment was made to prevent seizure of property and to prevent injury to business [R. 13]. Respondent filed exceptions thereto [R. 27] asking dismissal of the amended libel on the sole ground that "the claim of libelant is for recovery back of a voluntary payment made by libelant as consideration for compromise and settlement of disputed

claims." Respondent also filed verified exceptive allegations including Exhibits "AA," "BB" and "CC" [R. 27-38]. Libelant filed verified answers to the exceptive allegations [R. 38-43] supported by Exhibits "N" through "S" [R. 43-54].

On August 27, 1956, upon stipulation that the exceptions, the exceptive allegations and answering allegations would all be considered part of the record on appeal, libelant declined to plead further and the Court sustained the exceptions to the amended libel and entered its decree dismissing the amended libel [R. 55-56].

On September 17, 1956, due notice of appeal and statement of points on appeal were filed by libelant.

The sole question presented to the Court on appeal is whether the amended libel, as supplemented by the verified answers to the exceptive allegations, alleges "a voluntary payment made by libelant as consideration for compromise and settlement of disputed claims," as contended by respondent, or alleges an involuntary payment made to prevent seizure of property and injury to business interest and/or a payment made under an express reservation of right to sue for recovery, as contended by libelant.

The facts upon which that question is to be decided are as follows:

Libelant, a Delaware corporation [R. 3], as owner of certain tank steamships [R. 4-5], chartered the same to respondent under the latter's World War II requisitioning

program and operated said tankships for respondent as the latter's time charter agent. During the course of such operations certain disputes arose between the parties as to the overtime and other charges allowed libelant as owner and the charter hire to be paid libelant. As a result of these disputes, libelant and respondent entered into a written agreement settling the overtime question on the basis of the overtime as charged and paid for and reflected upon the books, records and accounts maintained by libelant for respondent and supervised and audited by respondent [R. 9].

Subsequently, respondent subjected these operations to renegotiation, and in such renegotiation allowed libelant to retain 25 cents per DWT per month and recaptured all profits in excess thereof then shown by the said audited books, records and accounts. The parties entered into Renegotiation Agreements, as alleged in the amended libel [R. 14-16] under which respondent agreed not to reopen its determination of excessive profits except under facts involving fraud which is not applicable herein.

Notwithstanding the agreement as to the overtime split, as alleged in the amended libel [R. 9] and the agreements set forth in the Renegotiation Agreements [R. 14-16], respondent, some three years after the last vessel was redelivered, re audited the books, records and accounts and notified libelant that certain overtime and other charges as shown therein and previously approved and accepted by respondent would be charged back to libelant [R. 10-13, 16-17], and libelant was informed that unless

the same were paid, the amount claimed would be offset against sums due libelant under supply contracts [R. 12, and Ex. "K" at R. 24].

Libelant sought to prevent the offset by suit under the Administrative Procedure Act but the case was dismissed for want of jurisdiction [R. 11].

Libelant then sought a settlement of the claims on the basis that respondent would give libelant a general release so that the wartime operations could be finally closed [Ex. "BB" at R. 35 and Ex. "S" at R. 52]. This respondent rejected and insisted that libelant make the payment demanded and waive its right to sue for recovery [Ex. "BB" at R. 34 and Ex. "Q" at R. 48]. Libelant refused to do this and finally Mr. Pimper, the Assistant General Counsel of the Maritime Administration, agreed to accept payment under protest with the understanding that libelant would promptly sue for recovery so that the question of liability could be judicially determined [R. 42]. Such payment was made by libelant under an express reservation of right to sue for recovery [R. 42] and such payment was made by libelant to prevent seizure of libelant's property [R. 13 and 42] and to prevent serious injury to libelant's business and reputation [R. 13].

The pleadings clearly show that libelant was determined to have a judicial determination of the validity of respondent's claim. Libelant first attempted this under the Administrative Procedure Act [R. 11]. That case was

dismissed for want of jurisdiction. Libelant also filed an action in the Court of Claims, which it agreed to dismiss if settlement would be reached [Ex. "BB" at R. 35]. The Court is asked to take judicial notice of the fact that the Court of Claims case was dismissed on or about September 21, 1955, shortly after payment was made under protest with the reservation of right to sue for recovery pursuant to an understanding with respondent's counsel [R. 42].

Specification of the Errors.

The District Court erred in the following respects:

1. In sustaining respondent's exceptions to the amended libel [R. 56]; and

2. In dismissing the amended libel [R. 56].

Summary of Argument.

Point I.

The Truth of the Allegations Is Admitted for the Purpose of This Appeal.

It is well settled that in considering an exception to a libel in admiralty, as in the case of a motion to dismiss in a civil action, the truth of the allegations is admitted. The allegations before the Court show a payment under duress and compulsion to prevent seizure of property and injury to business interest. The allegations also show payment under protest with an express reservation of the right to sue. Such a payment is involuntary and may be recovered.

Point II.

The Payment Sought to Be Recovered Was Made Involuntarily and May Be Recovered Back.

The strict rule of voluntary payment has been substantially relaxed. It is now well settled that a payment made with full knowledge of the facts but for the purpose of preventing seizure of the payor's property by summary proceeding or to prevent business injury or inconvenience is not a voluntary payment and may be recovered back. More specifically, the rule of voluntary payment does not apply to payments made to prevent actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, for which the latter has no other immediate means of relief than such payment. Libelant may therefore maintain this action.

Point III.

Libelant Had the Right to Choose the Lesser of Two Evils.

It is well recognized that a party under duress has the right to choose the lesser of two evils; in other words, to take the course of action which to him seems best for himself. Here libelant was under the threat of having respondent's claim collected summarily by the seizure of monies due libelant. Libelant had the choice of either paying the claim and suing for recovery or awaiting the seizure of its property and suing for recovery. The latter course would have resulted in substantially greater

expense to libelant and would have injured its business reputation. Its choice of the lesser of the two evils did not make the payment a voluntary payment and libelant may recover the payment so made.

Point IV.

The Payment Was Made Under an Express Reservation of Right to Sue for Recovery.

It is well settled that the payment of a claim made under protest and under an express reservation of the right to sue for recovery is not a voluntary payment and may be recovered. The record clearly shows that libelant was determined to have a judicial determination of the validity of respondent's claim, whereas respondent was seeking payment of its claim without giving libelant the right to pay under protest and sue for recovery. This libelant refused to do and payment was not made until after respondent's counsel agreed to accept payment under protest with the knowledge, understanding and agreement that libelant reserved the right to sue for recovery.

Relying on that agreement, libelant paid under protest, dismissed its suit in the Court of Claims, and brought this action for recovery of the payment made under protest. Such a payment is not a voluntary payment and libelant may recover the payment so made. Libelant should have its day in court to prove its allegations.

ARGUMENT.

POINT I.

The Truth of the Allegations Is Admitted for the Purpose of This Appeal.

No citation of authority is needed for the proposition that in considering an exception to a libel in admiralty, as in the case of considering a motion to dismuss in a civil action, the truth of the allegations is admitted. It is also well settled that in filing an exception to a libel the use of exceptive allegations and answers thereto are also proper.

Benedict on Admiralty (6th Ed.), Vol. 2, p. 56;
Sword Line v. United States, 228 F. 2d 344.

Here the parties have stipulated that the exceptions, the exceptive allegations, and the answers to the exceptive allegations are all a part of the record on appeal. It follows, therefore, that libelant's allegations appearing in the libel and in the answers to the exceptive allegations must be accepted as true for the purpose of this appeal.

The facts alleged show a wrongful and unlawful demand by respondent which had the power, without resort to a suit where libelant could defend itself, to similarly seize property of libelant and to injure libelant's business interest. The facts alleged show a threat by respondent to exercise that power unless libelant paid said demand and compliance by libelant to prevent such seizure and injury. It was error therefore to dismiss the amended libel.

79 A. L. R. 659.

POINT II.

The Payment Sought to Be Recovered Was Made Involuntarily and May Be Recovered Back.

It is well settled that a payment voluntarily made with full knowledge of the facts may not be recovered back.

Chesebrough v. United States, 192 U. S. 253, 48 L. Ed. 432 (1904);

Union Pacific R. Co. v. Bd. of County Commissioners, 198 U. S. 541, 25 L. Ed. 196 (1879).

But the harsh rule of these cases has long since been relaxed.

Robertson v. Frank Bros. Co., 132 U. S. 17, 33 L. Ed. 236 (1889);

Thompson v. Deal, 92 F. 2d 478 (C. A. D. C., 1937);

Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751 (1920);

Southern Pacific Co. v. United States, 268 U. S. 263, 69 L. Ed. 947 (1925);

40 Am. Jur. 826-827, Secs. 163-164; 831, Sec. 171.

In the *Robertson* case the Supreme Court on page 238 applied the "prudent business man" rule and on page 239 said:

> "In our judgment the payment of money to an official, as in the present case, *to avoid an onerous penalty,* though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one." (Emphasis added.)

In that case the penalty involved was one or two hundred dollars. Here the added expense is several thousand dollars.

In the *Thompson* case the Court said at page 485:

> "We think it is manfest from what is said in the case just cited [Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 1912] that the question of whether a payment is vountary or involuntary has been in large measure relieved of the artifical tests formerly applied by some courts."

In the *Ward* case at page 24 the Court said:

> "It is a well-settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' "

As shown by the *Southern Pacific* case the requirement today is that the claimant so conduct himself as not to mislead the Government into believing that he was not asserting any further claim. In the *Southern Pacific* case at page 267 the Court said:

> "We conclude that the indorsement of these protests on the vouchers sufficiently notified the government officers that *the payment of the land-grant rates was not accepted in final settlement* of transportation claims, and that as to such vouchers, the government has not established an acquiescence in the payment of the land-grant rates which discharges the claims for the remainder of the full tariff fares." (Emphasis added.)

In the case now before this Court the respondent knew of libelant's position and agreed to accept payment under

protest with knowledge that libelant reserved the right to sue for recovery. That certainly was not misleading.

It is abundantly clear that respondent has been fully informed all along that libelant challenged the propriety of the charges and intended to seek judicial determination of their validity. That is more than sufficient under the authority of *Southern Pacific Co. v. United States, supra,* to sustain the amended libel herein.

There, as here, an unjust enrichment resulted, and here the Court, as it did in the *Southern Pacific* case, should give the injured party its day in court.

See 40 American Jurisprudence 826, Section 163, and also see 40 American Jurisprudence 826-827, Section 164, which reads in part as follows:

> "However, as already has been noted, the strictness of the common-law rule has been greatly relaxed, and when concessions are exacted through one's necessity, to save his property, illegally withheld by another, from destruction or irreparable injury, the transaction may be avoided on the ground of compulsion, although not amounting to technical duress." (Citing *Harris v. Cary,* 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913A, 1350.)
>
> "Money paid under practical compulsion has in many cases been allowed to be recovered, as, for example, payment made to obtain goods wrongfully detained; * * *"

See also 40 American Jurisprudence 831, Section 171, which applies the "prudent business man" rule, stating that where "in equity and good conscience the receiver should not retain, the payment may be recovered."

But even if there were no relaxation of the harsh rule of voluntary payment all of the authorities recognize an exception where, as here, the payment is made to prevent seizure of the payor's property by summary proceeding or to prevent injury to his business interests.

Chesebrough v. United States, supra;

Union Pacific R. Co. v. Bd. of County Commissioners, supra;

Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280, 56 L. Ed. 436 (1912);

Union Pacific R. Co. v. Public Service Commission of Mo., 248 U. S. 67, 63 L. Ed. 131 (1918);

Altvater v. Freeman, 319 U. S. 359, 87 L. Ed. 1450 (1943);

District of Columbia v. American Security & Trust Co., 202 F. 2d 21, 22 (C. A. D. C., 1953).

In the *Atchison* case Mr. Justice Holmes overruled the Government's contention that the payment under protest was voluntary, saying at page 285:

> "Of course, we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defense; *but when, as is common, the state has a more summary remedy, such as distress,* and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little to slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, *if at the same time, the citizen is put at a serious disadvantage in the assertion of his legal,* in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disad-

> vantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms." (Emphasis added.)

Precisely the same situation is presented here. Respondent was about to seize property through a summary procedure where libelant could not enter any defense.

The *Atchison* case and the later *Union Pacific* case were cited with approval by the Court in the *Altvater* case. Moreover, the earlier *Union Pacific* case was not followed in the later *Union Pacific* case nor in the *Atchison* case. This failure to follow the earlier *Union Pacific* case was expressly noted in January, 1953, by the Court of Appeals for the District of Columbia in the *District of Columbia* case, *supra,* where the Court not only cited the *Atchison* case and the later *Union Pacific* case with approval, but cited the earlier *Union Pacific* case with disapproval and expressly overruled one of its prior decisions based thereon. In the *District of Columbia* case the Court quoted with approval from the decision below as follows at page 22:

> " 'Obviously plaintiff could not afford to run the risk of being publicized as a tax delinquent or of having its property distrained.' The payments were therefore involuntary in the legal sense. 'To say that a man who pays money must be held to have acted freely unless he did it under pressure of *immediate* and *urgent necessity,* suggests a high standard of pluck and manhood, but in transactions with the Government it is not a fair and reasonable test. When a demand is made by an official, known to have at his back, even though he may not threaten to use them, the penalties of law, the individual citizen does not stand on an equal footing * * *.' " (Emphasis supplied by the Court.)

We submit that there is a striking similarity between the situation there considered and here presented. There, as here, summary seizure of property was threatened and the reputation of the payor was at stake. Additionally. in this case libelant would have been put to substantial extra expense and legal disadvantage.

The amended libel clearly alleges an involuntary payment to prevent summary seizure of property and to prevent substantial injury to a business interest. Under the foregoing authorities the trial court should have overruled the exceptions to the amended libel and tried the case on its merits.

POINT III.

Libelant Had the Right to Choose the Lesser of Two Evils.

In this case libelant was under respondent's threat to collect its claim by seizing monies due libelant for merchandise furnished under supply contracts, thereby putting libelant at great legal and business disadvantage. Libelant had the choice of paying the claim and suing for recovery in the admiralty court or of allowing its property to be seized and then suing in the Court of Claims for recovery. In libelant's opinion the first course was the lesser of two evils for it was far less expensive, did not tarnish libelant's record as a supplier of products, and the case would be tried in a forum learned in admiralty.

Libelant had the unquestioned right to choose the lesser of the two evils as it saw them, and the fact that it chose according to its own best interest does not exclude duress

nor change the payment from an involuntary payment to a voluntary payment.

Union Pacific R. Co. v. Public Service Commission of Mo., supra.

In the *Union Pacific* case the Court said at page 70:

"Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

See also:

Robertson v. Frank Bros. Co., supra;

40 Am. Jur. 827 (Sec. 166), 828 (Secs. 167, 168), 831 (Sec. 171), 904 (Sec. 298);

17 Am. Jur. 878 (text and footnote 7), 879 (text and footnote 19).

40 American Jurisprudence 826, Section 164, reads in part as follows:

"It is firmly established that money paid to prevent an illegal seizure of person or property may be recovered."

Citing among others,

Lamborn v. Dickinson County, 97 U. S. 181, 24 L. Ed. 926.

40 American Jurisprudence 827-828, Section 166, reads in part as follows:

"To constitute duress, which will render a payment involuntary, *it is sufficient if the will is constrained by the unlawful presentation of a choice between comparative evils, as inconvenience and loss by the*

> *detention of personal property,* loss of property altogether, or compliance with an unconscionable demand."

We submit that in this case the precise situation was presented. As pleaded in the amended libel, libelant would have been put to greater legal and financial inconvenience and would have suffered business damage if it had failed to pay the demand. Moreover the respondent's demand under the circumstances of this case was unconscionable. Libelant's exercise of its right to choose did not render its payment voluntary and preclude a suit for recovery thereof.

See also 40 American Jurisprudence 828, Section 167, and *Lonergan v. Muford,* 148 U. S. 581, 37 L. Ed. 569, and Section 168 which reads in part as follows:

> "As a general rule, whenever a demandant is in position to seize or detain the property of him against whom the claim is made without a resort to judicial proceedings, in which the party may plead, offer proof, and contest the validity of the claim, payment under protest, to recover or retain the property, will be considered as made under compulsion, and the money can be recovered."

That is precisely the situation presented to the Court in this case. By the common practice of offset, respondent was in a position to seize and detain the property of libelant without resort to judicial proceedings. Libelant would have been required to go into the Court of Claims and sue for payment for the products delivered, and in the Court of Claims the respondent would have asserted that the sum was not due and the Court of Claims would have been the tribunal deciding this admiralty case.

As pleaded in the amended libel, the Court of Claims proceeding would have been more inconvenient and far more expensive than the proceeding in this case. Moreover, it would have entailed tarnishing libelant's record in its relations with the Federal Government. Furthermore there is substantial legal doubt that the Court of Claims would exercise jurisdiction over an admiralty matter.

Under the circumstances, all of the authorities agree that libelant's exercise of its choice in the matter did not render its payment voluntary so as to preclude a suit for recovery.

It was error for the Court in the case below to dismiss the amended libel.

POINT IV.

The Payment Was Made Under an Express Reservation of Right to Sue for Recovery.

Respondent was pressing an illegal claim. Libelant as early as January 28, 1954, had indicated in writing that it was willing to pay the claim if its validity could be judicially determined [R. 45]. Respondent at first refused to agree to a payment under protest with reservation of the right to sue for recovery [R. 34 and 49] but later agreed to accept payment under such circumstances [R. 42]. It was not until this agreement was reached that libelant made the payment under protest on August 26, 1955, moved to dismiss its suit in the Court of Claims on September 14, 1955 (the Court is asked to take judicial notice of this fact), and filed its first libel on November 30, 1955, to recover the payment made under protest.

Such a payment may be recovered in a suit brought for that purpose.

United States v. Ohio Oil Co., 163 F. 2d 633 (C. A. 10, 1947), cert. den. 333 U. S. 833;

In re New York, O. & W. R. Co., 178 F. 2d 765 (C. A. 2, 1950);

Empire Engineering Co. v. United States, 59 Ct. Cls. 904 (1924);

Lobit v. Marcoulides, 225 S. W. 757 (Tex. 1920);

Replogle v. Ray, 48 Cal. App. 2d 291 (1941).

In the *Ohio Oil Co.* case, although reversed on other grounds, the Court said at page 637 concerning the Government's attempt to defeat the claim on the ground that the payment was voluntarily made and therefore not recoverable:

> "The argument seems to be that the Ohio was not required to pay the funds, but could have awaited the threatened suit to cancel the lease, and there interposed as a defense the issues which form the basis for this suit.
>
> "No doubt the Ohio could have pleaded its construction of the lease as a valid defense to a suit for cancellation. See Bell Oil & Gas Co. v. Wilbur, 60 App. D. C. 256, 50 F. 2d 1070. But the remedy thus afforded is in no wise exclusive of the remedy asserted here. The action to enjoin the Secretary of the Interior from instituting proceedings to cancel oil leases in the Bell case failed because the plaintiff had an adequate remedy at law. *The availability of the remedy suggested by the Government certainly does not preclude the Ohio from paying the funds under protest and bringing suit to recover on the theory that they were exacted under a misconstruction of the contract between the parties.*

"The fact that the funds were paid under protest does not lessen the coercive effect of the demands, nor change the nature of the lawsuit. The Ohio was put to the choice of defying the asserted authority of the Secretary and awaiting the institution of a threatened suit to cancel, or to follow the more amicable course of making a *payment under protest upon the condition that it would be repaid if not owing. It is laudable for the Government, acting in its proprietary capacity, to agree with its contracting citizens to submit their differences for judicial determination.* Such conduct should be encouraged and not viewed with a critical eye. We conclude that the payment of the funds by Ohio would not, in the circumstances, preclude it from maintaining this suit to recover." (Emphasis added.)

It is contrary to the public policy announced in the *Ohio Oil Co.* case to permit the Government to successfully contend that the payment was voluntary after it agreed to accept payment under protest with full knowledge and agreement that libelant was reserving the right to sue for recovery.

In the *New York, O. & W. R. Co.* case an action was brought to recover overpayments, and the Government sought dismissal on the grounds that the payments were voluntarily made and could not be recovered. The trial court sustained the Government but was reversed in a *per curiam* decision, the Court saying at page 766:

"In the case at bar there was not merely a payment under protest, but a payment conditioned upon the right of the petitioner to a review of all of the trustees' bills and '*with the understanding* that to the extent that such review shall determine there is any moneys due and owing by the Trustees, you will comply with such order as the Court may issue in

connection with our petition.' *This was a plainly conditional and not a voluntary payment and it entitled the petitioner to a judicial review of any obligation it was claimed to have been under to make the payment.* Such a treatment of the transaction seems to be required under the decisions of the New York Court of Appeals in Nassoiy v. Tomlinson, 148 N. Y. 326, 331, 42 N. E. 715, 51 Am. St. Rep. 695, and Hudson v. Yonkers Fruit Co., 258 N. Y. 168, 171, 179 N. E. 373, 80 A. L. R. 1052. See also Restatement Contracts Sec. 420." (Emphasis added.)

In the *Empire Engineering Co.* case the plaintiff contracted with the Army Engineers for certain dredging work. The Chief of Engineers had approved certain delays which the Comptroller General disallowed on the grounds that the contracting officer had no authority to approve them; whereupon, the plaintiff was requested to pay and paid the $953.03. The question was whether the payment was made voluntarily, and at page 906 the Court said:

> "In order to avoid embarrassment by said officer by reason of said payment or *possible deduction from moneys thereafter to become due to plaintiff from the United States* or a possible suit against claimant by the United States, plaintiff paid said sum of $953.03 to said district engineer officer with a statement that such amount was paid without waiver by plaintiff of its right to recover the same by suit in the Court of Claims or elsewhere." (Emphasis added.)

A similar situation is presented here. Respondent knew libelant was reserving the right to sue for recovery and agreed to accept payment under protest under that condition.

In the *Lobit* case an action was brought to recover some $5,700 paid under protest with the express understanding and agreement that such payment would not affect the payor's right to sue for recovery. The jury found that the payment was not due. The claim was made that the payment could not be recovered because it had been voluntarily made. Concerning this, the Court said at page 762:

> "We think the question of appellees' right to recover the money which, under the finding of the jury, appellants were not entitled to demand of them is relieved of all doubt by the express terms of the release and receipt executed by appellants when the money was paid by appellees. The release receipt recites that the sum paid by appellees to obtain the release of the judgment was paid under protest; 'they claiming no sum due thereon, and without prejudice to their right, if any, to bring suit therefor.'"

This notation shows that the payee knew the payor was reserving the right to sue for recovery. That is exactly the situation here.

In the *Replogle* case there was an understanding between the parties that a joint payment by them of a settlement with the Air Way Company would not be determinative of their respective individual rights as against each other. At page 303 the Court said that at the time of the Air Way settlement plaintiff's and defendant's attorneys had agreed that settlement of all matters between them would await their return to California. And at page 307 the Court said:

> "* * * that *it was agreed* between the parties at the time of said settlement that their respective claims which were made the subject of this litigation should be reserved for future adjustment and settlement * * *." (Emphasis added.)

It does not appear that these agreements were in writing, but the Court said at page 308:

> "Furthermore there was an agreement between the parties at the time of payment, that the rights between the parties would be reserved for future settlement. *This constituted an express reservation of the right to recover any sums due and the doctrine of voluntary payment is inapplicable* (48 C. J. 741)." (Emphasis added.)

Such an agreement is alleged here and libelant should have the opportunity of proving the allegation at time of trial.

See also 70 Corpus Juris Secundum, Section 144, which states at page 349:

> "*Reservation of rights.* A payment made with the express reservation of the right to recover it by suit has been held to authorize a recovery thereof."

And 70 Corpus Juris Secundum, Section 153, where it is stated at pages 360-361:

> "Where a receipt taken for the money paid expressly states that the payment is under protest and does not defeat the right to sue and recover the money, it may be recovered back regardless of whether or not the facts amount to payment under duress."

The allegations considered by the trial court show clearly that respondent accepted payment under protest with full knowledge of and agreement that libelant reserved the right to sue for recovery. It was error to sustain the exceptions and dismiss the amended libel.

Conclusion.

For the purpose of this proceeding the allegations of libelant appearing in the record are admitted as true.

Those allegations show clearly (1) that respondent made an unlawful demand upon libelant and threatened to seize libelant's property if libelant did not pay; (2) that libelant had the choice of acceding to that demand and suing for recovery or of allowing seizure to take place and suing in the Court of Claims for funds due it under its supply contracts; (3) that libelant decided to pay under protest and sue for recovery and did pay under protest under an express reservation of the right to sue for recovery; (4) that such payment was made under protest to prevent the seizure of libelant's funds in the hands of other departments of the respondent and to prevent serious business disadvantage.

Payment under those circumstances was made involuntarily, and under the law libelant is entitled to sue for recovery.

It was, therefore, error for the Court in the case below to sustain the exceptions to the amended libel and to dismiss the amended libel. We urge that this Honorable Court reverse the trial court and remand the case for trial on its merits.

Respectfully submitted,

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